No. 9403

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

THE OREGON SHORTLINE RAILROAD COMPANY, A CORPORATION, AND SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, A CORPORATION, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

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OPINION BELOW

The opinion of the district court is not reported but may be found in the record at pages 36–43.

JURISDICTION

This suit was instituted by the United States on behalf of the Shoshone and Bannack tribes of Indians under authority of the Act of September 1, 1888, c. 936, 25 Stat. 452, and jurisdiction of the district court was invoked under section 14 of that act (R. 3). The judgment of the district court dismissing the complaint was entered September 19, 1939 (R. 44–45). Notice of ap-

peal was filed December 9, 1939 (R. 45–46). The jurisdiction of this Court is invoked under section 128 of the Judicial Code, as amended, 28 U. S. C., sec. 225 (a).

QUESTIONS PRESENTED

The Act of September 1, 1888, c. 936, 25 Stat. 452, granted the defendant railroad a right of way through an Indian reservation and required the railroad to "execute a bond to the United States * * * in the penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannack tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes."

The questions presented are (1) whether the Act imposes absolute liability upon the railroad to pay for damages caused by the operation of trains through the reservation without regard to negligence, and (2) whether the Act, if construed as imposing absolute liability, is constitutional.

STATUTE INVOLVED

The pertinent provision of the act of September 1, 1888, c. 936, sec. 14, 25 Stat. 452, is set forth in the statement at page 4, *infra*.

STATEMENT

The United States, on behalf of the Shoshone and Bannack tribes of Indians, brought this suit pursuant to section 14 of the Act of September 1, 1888, c. 936, 25 Stat. 452, and on a bond given thereunder, to recover damages in the sum of $10,000 for the killing and maiming of four Indians (R. 2–20).

On January 19, 1938, at a railroad crossing within the Fort Hall Indian Reservation, a train operated by the defendant railroad collided with an automobile occupied by four Indians of the Shoshone and Bannack tribes (R. 11). Three of the Indians were killed and the fourth was injured (R. 12). This suit was filed after both the defendant railroad and the surety on its bond failed to pay the damages upon demand (R. 12). The following background is necessary for an understanding of the issues here presented:

The Fort Hall Indian Reservation was established for the Shoshone and Bannack tribes of Indians by the Treaty of July 3, 1868, 15 Stat. 673. This treaty provides in part:

> And the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians * * *.

Neither the Oregon Shortline Railroad Company nor its predecessor, the Utah & Northern Railway Company, was one of the persons authorized to go upon the lands designated by the treaty (R. 4–5). Nevertheless, the Utah & Northern Railway Company constructed its line through the Fort Hall Indian Reservation without having first obtained a right of way.

To adjust the rights of the tribe and to enable the railroad company to acquire the necessary right of way

through the reservation, the United States and the Shoshone and Bannack tribes entered into an agreement which was accepted and ratified by Congress by the Act of September 1, 1888, c. 936, 25 Stat. 452. Section 14 of the Act provides:

> That said railway company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannack Tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their livestock, in the construction and operation of said railway, or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to effect amicable settlement with the parties in interest, to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States attorney in the name of the United States: *Provided,* That all moneys so recovered by the United States attorney under the provisions of this section shall be covered into the Treasury of the United States, to be placed to the credit of the particular Indian or Indians entitled to the same, and to be paid to him or them, or otherwise expended for his or their benefit, under the direction of the Secretary of the Interior.

The Oregon Shortline Railroad Company and St. Paul-Mercury Indemnity Company executed a bond as contemplated by the foregoing section (R. 8–10). The

bond recites the statutory grant of the right of way and the pertinent part of the above mentioned section 14 and further provides,

> Now, therefore, if the said Oregon Shortline Railroad Company, its successors or assigns, shall make full satisfaction for any and all such deaths, injuries, or damages, then this obligation shall be null and void; otherwise to remain in full force and effect (R. 9).

All of the foregoing facts are set out in the complaint filed by the United States. Defendants' motions for a more definite statement or for a bill of particulars, were denied by the court (R. 27). Thereafter, defendants filed an answer setting up three defenses: (1) that the complaint fails to state a claim upon which relief can be granted; (2) a general denial of liability; and (3) a denial that the statute and bond created a right of action and further, to render judgment would deprive the defendants of property without due process of law (R. 28–33).

The United States took the position that under the statute and the bond given pursuant thereto the liability of the defendants was absolute. Accordingly, it filed a motion to strike the third defense (R. 34) and moved for summary judgment on the complaint (R. 34–35). Both motions were denied (R. 44). The United States elected to stand upon its complaint and declined to plead further (R. 45).

On September 19, 1939, the court entered judgment in favor of the defendants, dismissing the complaint on the ground that it did not state a claim upon which relief could be granted (R. 44–45).

STATEMENT OF POINTS RELIED UPON

I

That the Act of September 1, 1888, c. 936, 25 Stat. 452, imposes absolute liability upon the railroad company to pay for damages caused by the operation of the railroad without regard to negligence.

II

If the statute is construed to impose absolute liability on the railroad, under the circumstances of this case the railroad cannot assert unconstitutionality of the statute at this time.

III

Assuming the railroad could inquire into the constitutionality of the Act of September 1, 1888, that statute when so construed is constitutional and does not violate the due process clause of the Fifth Amendment of the Constitution of the United States.

ARGUMENT

I

The Act of September 1, 1888, imposes absolute liability for damages caused by the operation of the railroad

A. It is clear from the language of the Act that Congress imposed absolute liability

It is plain from a reading of section 14 that Congress intended to make the company and its surety responsible for damages resulting from the operation of the railroad through the Indian reservation irrespective of negligence. The section expressly states:

> That said railway company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the

> penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannack tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their live-stock, in the construction and operation of said railway, or by reason of fires originating thereby; * * *

There is no indication that the damages to be recovered must result from the *negligent* operation of the railroad. The language of the section admits of no such qualification. On the contrary, the clear and unequivocal language used by Congress indicates an intention to impose liability irrespective of negligence.

The district court reached a contrary result by an involved process of reasoning which, in effect, was a rewriting of the statute. It took the phrase "damages which may accrue" and immediately cast aside the word "damages" which Congress had used and substituted "cause of action" saying (R. 39),

> Accrue as that phrase is used by the Courts when in speaking of a *cause of action* is, at a time which an enforceable *legal right* arises. [Italics supplied.]

The court then took the words "legal right" which it had thus read into the statute and construed them as follows (R. 40):

> Then what constitutes a *legal right,* is it one granting to one the right to recover damages although the one sued be not negligent or at fault, or can it be reasoned that it would be a right not

> based upon a wrongful act or negligence of another? The term *legal* is that authorized by law; the observance of the forms of the law, and the act is one rightful in substance, and moral quality is observed. Should the statute be construed as excluding the right to assert that the railroad company was not negligent or at fault, * * * *it would be ignoring the definition of the term legal,* which requires the act complained of to be one rightful in substance. [Italics supplied.]

In short, the district court inserted new words in the statute and then decided that the words which it had added necessitated the conclusion that the railroad was liable only if negligent.

It is submitted that the court's interpretation is completely unwarranted. No such narrow distinction can be applied to the words used in the provision. By attaching an unduly technical and restricted meaning to the word "accrue" the court read into the statute a requirement that Congress never intended should exist.

Although the district court did not apply the rule its opinion recognizes that it is a cardinal principle of statutory construction that "Congress must be presumed to use words in their ordinary and known signification" (R. 39). The statute contains no indication to the contrary. This Court has defined the word "accrue" as follows:

> To grow to; to be added to; to become a present right or demand * * * To rise, to happen, to come to pass * * *.
> As a general statement, the word "arose" seems most expressive. * * * *H. Liebes & Co.* v.

Commissioner of Internal Revenue, 90 F. 2d 932, 936, C. C. A. 9 (1937).

Thus, the appellees were to be liable for any and all damages that *arose* "by reason of the killing or maiming of any Indian belonging to said tribes, or either of them * * * in the construction and operation of said railway." This, the United States contends, is the plain meaning of the statute.

B. If any doubt exists as to the meaning of section 14 it must be resolved in favor of the Indians and the United States

The district court approached the question at issue as if only a general statute regulating railroad liability were involved. Compare *Castril* v. *Union Pac. Ry. Co.,* 2 Idaho 576, 21 Pac. 416 (1889), upon which it relied (R. 43). It stated that the statute should be strictly construed as it was in derogation of common law (R. 41). There are two reasons why such a principle can have no application here.

In the first place, the provision in question is for the benefit of the Indians. Such statutes are to be liberally construed, all doubts to be resolved in favor of the Indians. *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 89 (1918); *Choate* v. *Trapp,* 224 U. S. 665, 675 (1912).

Secondly, the Act of September 1, 1888, is properly to be given effect both as a law and as a conveyance. Section 11 of that Act, in addition to granting to the railroad company a right of way through the reservation, also conveyed parcels of land along the line to be used for stations and other purposes. Section 14 was a further provision of the grant between the United States and the Indian tribes on one side and the rail-

road on the other. In the interpretation of such a provision, rules which would ordinarily control the construction of general statutes regulating railroad liability do not apply. For it is well established that a grant by the United States is to be strictly construed against the grantee. Black, Interpretation of Laws (1896) pp. 315–316. As stated by the Supreme Court in *Hannibal &c. Railroad Co.* v. *Packet Co.,* 125 U. S. 260, 271 (1888):

> But if there be any doubt as to the proper construction of this statute (and we think there is none), then that construction must be adopted which is most advantageous to the interests of the government. The statute being a grant of a privilege, must be construed most strongly in favor of the grantor.

C. The circumstances surrounding the passage of the Act indicate that the purpose of section 14 was to require the railroad to assume the risk of all losses as to life and property of the Indians which should result from the operation of the railroad through the reservation

In the absence of section 14 the company would be liable for loss of life and property of the Indians occasioned by the negligent operation of the railroad. In the final analysis, therefore, the decision of the district court means that the Indians bargained only for a bond in the amount of $10,000 to which they could resort when the railroad was liable by reason of negligence and failed to pay. Surely, it is not to be supposed that this was all that was sought by section 14. On the contrary, there are ample reasons to believe that the United States and the Indians sought and the railroad understood that it was to assume a larger responsibility.

1. When the United States and the Indians made an agreement to grant a right of way to the railway company, it must have been evident that in the operation of the railroad through the reservation there would be losses of the character described in section 14, even in the absence of negligence on the part of the railroad. Unless provision was made for the company to assume the risks of such losses the tribes or the United States as their guardian would have to bear them. That section 14 was agreed upon in order to shift the burden to the railroad would seem clearly to be the case. There was ample precedent for so doing.

For years prior to the enactment of this section legislation was in force in most of the states imposing absolute liability on railroads for damages resulting from fire. See *St. Louis & San Francisco R'y* v. *Mathews,* 165 U. S. 1 (1897), containing an historic treatment and summary of the various statutes then in effect. In addition, many states had also imposed liability irrespective of negligence for damages done by railroads to livestock along their rights of way. See *Missouri Pacific Railway Co.* v. *Humes,* 115 U. S. 512 (1885).[1]

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[1] Other instances reflecting legislative policy of absolute liability may be found in various fields. Railroads have been made liable without fault for injuries to passengers. *Chicago, R. I. & P'y. Co.* v. *Zernecke*, 183 U. S. 582 (1902). A driver of animals has been declared liable for injury to the highway, though guilty of no negligence. *Jones* v. *Brim*, 165 U. S. 180 (1897). Absolute liability has been imposed upon municipalities for injuries done by mobs within their borders. *Chicago* v. *Sturges*, 222 U. S. 313 (1911). Liability, irrespective of fault, has been imposed upon employers for the injury or death of employees occuring in the employment. *N. Y. Central R. R. Co.* v. *White*, 243 U. S. 188 (1917).

The considerations of public policy which have prompted legislation imposing absolute liability are summarized in *Martin* v. *New York & New England R. R. Co.*, 62 Conn. 331, 25 Atl. 239, 240 (1892):

> The reasons underlying this legislation are not hard to find. The railroad companies were in possession of great powers and privileges granted by the state. The use of such powers was necessarily attended with danger to property along the line of the road, and fires were of frequent occurrence. The legislature rightly judged that it was hard for individuals to bear all these losses, and that the railroad companies might well be required to make them good. Nor is such a requirement unjust. On the contrary it is substantially right and just. Railroad companies possess extensive powers and valuable franchises, by means of which they are able to collect large sums of money from the public. In using such powers and franchises they necessarily expose private property. They have a license from the public to carry on extensively a dangerous business, from which they receive large profits. Why should they not be required to assume the risk rather than individuals?

In view of the well established state legislative policy, it is difficult to suppose that Congress did not intend to protect the Indians in at least as effective a manner, particularly where no statute existed in the Territory of Idaho imposing absolute liability on the railroad, even as to damages caused by fire.

2. Cast in the setting of a prior grant, section 14 can be seen to be part of a legislative pattern of protection formulated by Congress on behalf of the Shoshone and

Bannack Tribes. In an earlier grant of a right of way on the same reservation to the same railroad, the United States and the tribe had required the railroad to assume the risk of all losses to Indian life and property, regardless of the railroad's freedom from negligence, and made failure to observe this requirement a condition for forfeiture of the grant. Act of July 3, 1882, c. 268, 22 Stat. 148. Section 3 of this act provided:

> Nor shall said land, or any part thereof, be continued to be used for railroad purposes by or for said Utah and Northern Railroad Company, its successors or assigns, except upon the further condition that said company, its successors or assigns, will pay any and all damages which the United States or said Indians, individually or in their tribal capacity, or any other Indians lawfully occupying said reservation, may sustain by reason or on account of the act or acts of said company, its successor or assigns, its agents or employees, or on account of fires originating by or in the construction or operation of such railroad, the damages in all cases to be recovered in any court in the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States Attorney in the name of the United States. * * *.[2]

In short, under the 1882 Act which granted a right of way running east and west the railroad was to pay

[2] Referring to this provision the House Committee on Indian Affairs in its report recommending the passage of the bill said, "It also provides that the company shall be liable for damages to the United States, or to the Indians, collectively or individually, that may be sustained by the acts of the company, its agents, or employees." H. Rept. No. 659, 47th Cong., 1st sess., p. 2.

any and all damages sustained "by reason or on account of the act or acts of said company," without qualification.

It is submitted that section 14 of the 1888 Act granting a right of way extending north and south contemplated the assumption of a similar obligation by the railroad.

To hold otherwise would result in the creation of an anomalous situation whereby one part of the railroad running east and west becomes absolutely liable for damages caused in its operation, while the other line running north and south is subject to liability only in the event of negligence.

3. It was an important purpose of the United States to protect every possible interest of the Indians. In the report of the House Committee on Indian Affairs, it was stated (R. 20):

> Provision is made for indemnification by the railway company to the Indians for killing or maiming the Indians or their stock; also for fencing in the railway track where it runs through improved lands of the Indians. *We believe, in short, that every interest of the Indians has been jealously guarded and protected.* [Italics supplied.]

When it is considered that at the time of the grant, the reservation was occupied by a nomadic and uncivilized people helplessly at the mercy of the railroad and unable to bear the loss themselves, it was natural for Congress to insert in the act a provision designed to protect them from the dangers of such an instrumentality. Certainly a provision for a $10,000 bond for

damages caused by the negligence of the railroad is hardly "jealous" protection of "every interest" of the Indians.

II

The imposition of absolute liability upon the railroad is constitutional

The appellees contended (R. 33) and the district court apparently took the view (R. 42–43) that the Act of 1888 would not be constitutional if it were construed as imposing absolute liability upon the railroad. It is submitted, however, that refusal to construe the statute broadly may not be grounded on the theory that the railroad would otherwise be deprived of property without due process of law.

The Government, of course, does not concede that the appellees are in a position to challenge the constitutionality of the statute. The railroad has accepted the benefits of the grant both by agreement with the Indians and the United States and by its subsequent acts in constructing and operating its line through the reservation. Having accepted the benefits, the company and its surety are estopped from repudiating the burdens attached. *Daniels* v. *Tearney,* 102 U. S. 415, 421 (1880); *Chicago, R. I. & R'y. Co.* v. *Zernecke,* 183 U. S. 582, 588 (1902); *Grand Rapids & Indiana Ry. Co.* v. *Osborn,* 193 U. S. 17, 29 (1904); *Booth Fisheries* v. *Industrial Comm.,* 271 U. S. 208, 211 (1926); *Wall* v. *Parrott Silver & Copper Co.*, 244 U. S. 407, 411 (1917). The constitutionality of an imposition of absolute liability is discussed at this time solely for what bearing it may have on the proper construction of the Act. The

Government contends that no doubt would be cast upon the validity of the Act by adopting the construction it advocates.

Because the United States could have withheld from the railroad the privilege of running its trains over the Indian reservation, it is clear that it could condition the grant of this privilege on the railroad's foregoing a constitutional right on the theory that the greater power includes the lesser. *Davis* v. *Massachusetts,* 167 U. S. 43 (1896); *Atkin* v. *Kansas,* 191 U. S. 207 (1903); *Ellis* v. *United States,* 206 U. S. 246 (1907); *Heim* v. *McCall,* 239 U. S. 175 (1915); *Packard* v. *Banton,* 264 U. S. 140 (1923); *Fox River Co.* v. *R. R. Comm.,* 274 U. S. 651 (1926); *Hodge Co.* v. *Cincinnati,* 284 U. S. 335 (1931); *Stephenson* v. *Benford,* 287 U. S. 251 (1932).

Illustrative of this principle is the holding in *Fox River Co.* v. *Railroad Commission, supra.* In that case the Supreme Court held that a state statute which required a riparian owner to promise, as a condition precedent to his right to build a dam, that he would sell the dam to the state after 30 years, waiving all right to compensation in excess of replacement cost, did not deprive him of property without due process of law. The Court stated (p. 657) that compliance with the statute was the "price which plaintiffs must pay to secure the right to maintain their dam."

Applying this principle to the present case, it is plain that the Federal Government may demand of the railroad that it bear the burden of absolute liability as part of the price to be paid for the right to construct, maintain, and operate its road through the Fort Hall Indian Reservation.

CONCLUSION

It is submitted that the judgment of the district court should be reversed.

Respectfully.

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